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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EVELYN PACE, Plaintiff and Appellant, v. CENTURY GAMING MANAGEMENT, INC. etc., Defendant and Respondent.	B200070 (Los Angeles County Super. Ct. No. BC348147)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Keith A. Fink & Asociates, Keith A. Fink, Sarah E. Hernandez and Brendan Y. Joy, for Plaintiff and Appellant.

Ford & Harrison LLP, Stephen R. Lueke, and Sergio Bent for Defendant and Respondent.

In the underlying action, the trial court granted summary judgment against appellant Evelyn Pace in her discrimination and retaliation action against her employer, respondent Century Gaming Management, Inc., d.b.a. Hollywood Park Casino (CGM). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts: Pace, an African-American woman, began working for CGM's Department of Group Events (DGE) in May 2000, when she was 47 years old. Pace was hired as an event administrator. As such, she planned and organized group events held on CGM's property, including birthday parties, quinceaneras, weddings, family reunions, poker tournaments, and charity events. The events often involved several hundred guests, and included food, beverages, and entertainment. Pace was responsible for ensuring that the events went smoothly and that the client's expectations were met or exceeded.

In January 2001, Alyssa Rosen, a 38-year old Caucasian, became DGE's director. In early August 2002, Pace -- who was then the DGE's sole event administrator -- broke her foot in an accident unrelated to her work, and took a leave of absence. To ensure that CGM's events continued during Pace's leave, CGM hired Jennifer Miller, a 37-year old Caucasian, as a second event administrator in October 2002.

Pace returned to work in November 2002, when her doctors released her for work with specified restrictions. Pace's doctor authorized her to work without restrictions in December 2002. After Pace returned to work, Miller continued to work as an event administrator. In February 2005, CGM decided to reduce the DGE's size and laid off Pace, but retained Miller.

On September 19, 2005, Pace filed a complaint for discrimination and retaliation against CGM with the California Department of Fair Employment and Housing (DFEH). She initiated the underlying action against CGM in February 2006. Her third amended complaint, filed on September 13, 2006, asserts claims for discrimination based on race, age, and disability, retaliation, wrongful termination, failure to accommodate a disability, and failure to provide a medical leave under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.); a claim for wrongful termination in violation of public policy; and claims for violations of Labor Code sections 227.3, 511, and 512. On January 29, 2007, CGM filed a motion for summary judgment or adjudication on Pace's claims. On June 4, 2007, the trial court granted CGM's motion for summary judgment on Pace's complaint and entered judgment in CGM's favor.

DISCUSSION

Pace contends the trial court erred in granting summary judgment. We disagree.

A. *Standard of Review*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Thus, we apply "'the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has

raised a triable issue of fact. (*Ibid*.) In applying this process, we resolve any doubts as to the existence of triable issues in favor of the party opposing summary judgment.[1] (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Furthermore, in moving for summary judgment, "all that the defendant need do is show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id*. at p. 853, fn. omitted.)

Here, Pace and CGM each raised numerous evidentiary objections to the other's proffered showings. In granting summary judgment, the trial court overruled all of Pace's evidentiary objections and sustained some of CGM's objections. Because Pace does not challenge these rulings on appeal, our review is limited to the evidence admitted in connection with the summary judgment motion.[2] (*County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558, 564, fn. 3.)

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[1] Although we apply the same test as the trial court, we limit our inquiry into Pace's claims to the contentions addressed in her opening brief. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126 [even though review of summary judgment is de novo, review is limited to issues adequately raised in appellant's brief].)

[2] Pace relied exclusively on her evidentiary objections to raise factual disputes regarding numerous items in CGM's separate statement of undisputed facts. Because the trial court overruled her objections, we view the items in question as undisputed for purposes of our analysis. For similar reasons, we also regard as undisputed items Pace purported to dispute without citing any evidence.

B. *FEHA Claims*

1. *Governing Principles*

FEHA provides that it is an unlawful employment practice for an employer "to discriminate against [a] person in compensation or in terms, conditions, or privileges of employment" due to the person's race, age, or physical disability. (Gov. Code, § 12940, subd. (a).)[3] Under FEHA, terminations, demotions, and denials of available positions may constitute unlawful employment practices. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 373-375; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038.) In addition, FEHA establishes that an employer's failure to accord an employee a statutorily defined medical leave and failure to make "reasonable accommodation[s]" for an employee's disability are unlawful employment practices (§§ 12940, subd. (m), 12945.2, subd. (a)). FEHA also provides that it is an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd. (h).)

Here, Pace's complaint asserts that after she broke her foot in August 2002, CGM denied her a statutory medical leave (sixth cause of action) and failed to make reasonable accommodations when she returned to work, resulting in an improper reduction in her work responsibilities (fifth cause of action). The complaint further asserts that CGM treated Pace differently from similarly situated employees and terminated her in February 2005 on the basis of her race, age, and

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[3] All further statutory citations are to the Government Code, unless otherwise indicated.

disability (first, second, third, and seventh causes of action); moreover, it asserts that this misconduct was retaliatory (fourth cause of action).[4]

2. *Parties' Showings*

In seeking summary judgment, CGM contended that Pace's FEHA claims were time-barred insofar as they relied on events preceding her September 19, 2005 DFEH complaint by more than one year (§ 12960, subd. (d)); CGM also contended that the FEHA claims failed on their merits. CGM presented evidence supporting the following version of the underlying facts: Before CGM hired Pace as an event administrator in May 2000, Pace had worked only as an unpaid event coordinator. Shortly after Pace was hired, CGM also hired Shanika Williams, a 22- or 23-year old African-American, as an event administrator. In January 2001, Alyssa Rosen -- who had worked in CGM's marketing department -- became DGE's director. In February 2002, CGM laid Williams off, leaving Pace as DGE's sole event administrator.

During the pertinent period, most of DGE's clients contacted CGM on their own initiative; although Pace occasionally received calls directly from potential clients, calls were ordinarily forwarded to event administrators by Rosen or Gwen Pollard, a DGE casino services assistant. Event administrators were also expected to develop business through their own efforts.

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[4] In opposing summary judgment, Pace contended there were triable issues whether CGM had contravened section 12940, subdivision (n), which provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical . . . disability." As Pace did not allege the factual basis for such a claim in her complaint, she could not rely on it in opposing summary judgment. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541; *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18.) Moreover, as explained below (see pt.A.3, *post*), any such claim is time-barred.

In May 2002, Pollard spoke to Pace by phone using Pollard's speaker phone. Pace told Pollard that she planned to be absent from work the following day. When Pollard asked Pace whether she had notified Rosen about the absence, Pace said, "[F]uck her, I'm not calling her." Rosen overheard the conversation and issued a written disciplinary warning notice to Pace about her use of profanity. The notice, dated May 22, 2002, was signed by Rosen, and contained a notation that Pace had refused to sign it.

In June 2002, Rosen issued a verbal disciplinary warning notice based on numerous client complaints about Pace. The written record of the notice, dated June 13, 2002, identified several clients who complained to Rosen. The written record was signed by Rosen, and contained the following notation: "Verbally discussed w/Evelyn on 6/13/02."

After Pace broke her foot in early August 2002, CGM granted her request for a leave of absence and hired Jennifer Miller on a then-temporary basis as an event administrator. Miller, who was Rosen's friend, had worked as an event coordinator or in a similar position for over eight years. Pace began her leave on August 6, 2002. While on leave, Pace failed to modify her workplace voicemail message to inform clients she was absent from work; she continued to perform some work and to contact clients from her home until Rosen instructed her to stop.

Pace returned to work on November 14, 2002, when her doctors permitted her to work with the following restrictions: "30% walking daily," "no stairs," and "no driving." Pace wore a walking boot and had limited mobility. While working under the restrictions, Pace did not drive, climb stairs, or do much walking. Pace's doctor released her for work without restrictions on December 3, 2002.

After Pace returned to work, Miller continued to work as an event administrator. With the exception of clients who specifically requested to work with Miller, most of the clients with whom Pace had worked prior to her injury

were reassigned to her. In forwarding calls from potential clients to Pace and Miller, Rosen allocated the calls equally between them.

Upon Pace's return to work from her leave, Rosen issued a written disciplinary warning notice (dated August 16, 2002) to Pace, stating that she had exhibited poor client care and failed to ensure timely payments for events. The notice was signed by Rosen and Pace. Pace responded to the August 2002 notice in writing, asserting that it was issued due to a misunderstanding between Pace and Rosen. On January 30, 2003, Pace met with Rosen and Taro Ito, CGM's Vice President and Chief Operating Officer, to discuss the August 2002 notice. Ito ordered that the notice be removed from Pace's employee file.

In February 2003, Rosen issued a written performance review of Pace's work that stated: "Needs Improvement." In March 2003, after Pace challenged the performance review and complained to Jo Gilmartin, CGM's Human Resources Director, that Rosen was favoring Miller, Pace met with Ito, Rosen, and Gilmartin, and it was agreed that Rosen would reevaluate Pace. Rosen conducted another performance review within a few months.

In April 2004, Rosen received a letter from a client complaining about Pace's performance in connection with his event at CGM. Nonetheless, in July 2004, Rosen issued a written performance review that rated Pace's work as "much improve[d] over previous year," but suggested Pace needed to improve her computer skills. Pace never took the suggested computer classes.

In contrast with Pace, Miller received no formal disciplinary notices while CGM employed her, and all of her performance evaluations were positive with satisfactory to superior ratings. Pace's own efforts to recruit business generated 15 percent of her events, whereas Miller's recruitment efforts generated 33 percent of her events. Clients frequently asked Rosen for Miller's services, although some clients asked for Pace. In 2003, Pace earned slightly more than Miller, and

coordinated 248 events, in comparison with Miller's 173 events; in 2004, Miller earned slightly more than Pace, and coordinated 246 events, in comparison with Pace's 179 events.

In 2004, CGM decided to limit DGE's business activities to "repeat" clients due to violence at events involving "one-time" clients, and concluded that Pace or Miller should be laid off. In early 2005, Ito concluded that Miller was the better employee, and laid Pace off. Several months later, CGM merged DGE into its marketing department and laid Rosen off, but retained Miller as an event administrator.

In opposing summary judgment, Pace conceded much of CGM's showing. To the extent Pace submitted admissible evidence, she proffered the following version of the underlying facts: Prior to her employment by CGM, she was a member of the National Counsel [*sic*] of Negro Women (NCNW), and as such, coordinated events for that organization. She acknowledged that she used a curse word during a phone conversation with Pollard in May 2002, but contended that cursing was common at CGM and that Rosen had never taken action regarding similar incidents. She also asserted that she received no verbal notice about a client complaint in June 2002.

After Pace broke her foot in August 2002, she worked from her home for a period while she was on leave until she was asked not to do so. Rosen and Pollard knew that she was working from her home, and no one told her to change her voicemail. In hiring Miller, Rosen declined to rehire Williams, who was told there were no job openings. When Pace returned to work with medical restrictions, no one offered her a chair or pillow for her leg; moreover, many of her former clients were not returned to her, and no new clients were forwarded to her, as Rosen declined to give her new clients until her restrictions were lifted.

After Rosen gave Pace the disciplinary notice dated August 16, 2002, Pace challenged the notice, and Ito ordered that it be expunged from Pace's employee file. In May 2003, Rosen gave Pace's performance a good rating. As a result of the review, Pace received a merit raise and earned the same salary as Miller. Pace received no further disciplinary warnings or substandard performance reviews prior to her termination in February 2005.

Aside from a basic salary, event administrators received commissions for some events. After Pace returned from her medical leave, Miller received more commission-related events than Pace. In March or April 2003, Pace complained to Gilmartin about the disparate treatment, which led to an agreement that her performance would be reevaluated. In October or November 2004, Pace again complained to Gilmartin that Rosen was discriminating against her and favoring Miller. In December 2004, Pace complained to Rosen that she was entitled to share in the "commission windfall" from a then-recent upsurge in poker-related events, all of which had gone to Miller. In January 2005, Pace complained to Gilmartin about Rosen's discriminatory conduct and favoritism. Shortly thereafter, Pace was laid off.

3. *Statute of Limitations*

In granting summary judgment, the trial court determined that the applicable statute of limitations barred Pace's FEHA claims regarding improper denials of medical leave and reasonable accommodations for her disability. We agree.

Generally, a party may not assert a FEHA claim without having filed a DFEH complaint within one year after the date of the alleged unlawful act. (§ 12960.) Nonetheless, as our Supreme Court explained in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812-813 (*Richards*), an equitable exception to the one-year period originating in federal case law and known as the "continuing

violation doctrine" is sometimes applicable. "Essentially, the continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period." (*Id*. at p. 812.)

In *Richards*, an engineer with a good work record was stricken with multiple sclerosis. (*Richards, supra*, 26 Cal.4th at p. 802.) When her condition stabilized, she required a wheelchair but was capable of computer-based work on a part-time basis, which her employer permitted. (*Id*. at pp. 802-803.) Over an approximately four-year period, her employer engaged in various forms of harassment, including moving her to a substandard office and failing to provide minimal wheelchair access. (*Id*. at pp. 804-810.) The engineer resigned due to the cumulative effects of the harassment on her health, and asserted FEHA claims for disability harassment, discrimination, and failure to provide reasonable accommodations. (*Id.* at pp. 810-811.) After a jury returned a judgment in her favor, the Court of Appeal reversed, concluding that much of the conduct for which the jury awarded damages fell outside the one-year limitations period, and that the continuing violation doctrine was inapplicable. (*Id*. at p. 811.)

Our Supreme Court examined several approaches to the continuing violation doctrine in federal and California case law, and adopted a test originating in *Berry v. Board of Sup'rs of L.S.U.* (5th Cir. 1983) 715 F.2d 971, with modifications adapting it to the purposes of FEHA. (*Richards, supra,* 26 Cal.4th at pp. 820-823.) Under the *Berry* test, the application of the doctrine involves an assessment of the facts of the case, with attention to (1) whether the alleged acts involve the same type of discrimination, (2) the frequency of the acts, and (3) whether the acts were of sufficient permanence to place the employee on notice that his or her rights have been violated.[5] (*Berry v. Board of Sup'rs of L.S.U., supra,* 715 F.2d at p. 981.) In

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[5] The Supreme Court concluded that the *Berry* test, with suitable modifications, best

adopting the *Berry* test, the Supreme Court modified the requirement of permanence in factor (3): "[W]e . . . hold that 'permanence' . . . should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run . . . *either* when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." (*Richards, supra,* 26 Cal.4th at p. 823.)[6]

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reconciled competing policy considerations in the context of harassment and discrimination claims under FEHA. (*Richards, supra,* 26 Cal.4th at pp. 820-823.) The *Berry* test impliedly recognized that the process of providing reasonable accommodations to a disabled employee is usually a "single course of conduct" involving many acts, and thus it allowed employees to engage in informal conciliation to resolve difficulties, rather than compelling them to initiate litigation immediately following a questionable or improper act to avoid the one-year limitation on claims. (*Richards, supra,* at pp. 821-822.) However, as the court explained, the *Berry* test also impliedly recognized that employees should not be permitted to delay litigation indefinitely: "If the employer has made *clear in word and deed that the employee's attempted further reasonable accommodation is futile,* then the employee is on notice that litigation, not informal conciliation, is the only alternative for the vindication of his or her rights. Barring a constructive discharge, it is *at that point* the statute of limitations for the violation *begins to run.*" (*Richards,* at p. 823, italics added.)

[6] The Supreme Court has determined that the *Berry* test, so modified, is also applicable to FEHA claims regarding discrimination and retaliation. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1056-1059.)

In view of *Richards*, the trial court properly concluded that Pace's claims for denial of a medical leave and denial of reasonable accommodations were time-barred. The record unequivocally establishes that Pace returned from her leave of absence in November 2002 and that Pace's doctor released her to work without restrictions in December 2002. As CGM's alleged "course of conduct" in denying a medical leave and reasonable accommodations ended no later than December 2002 -- nearly three years before she filed her DFEH complaint -- the statute of limitations bars Pace's claims predicated on these allegations. (*Richards, supra*, 26 Cal.4th at p. 823.) Accordingly, we limit our analysis to Pace's remaining FEHA claims.

4. *Discrimination Claims*

In assessing whether summary judgment was properly granted with respect to Pace's discrimination claims, we apply established principles. "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes. [Citation.] In particular, California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, . . . based on a theory of disparate treatment. [Citations.]" (*Guz, supra,* 24 Cal.4th at p. 354.) Accordingly, had Pace reached trial with her discrimination claims, she "would of course have borne the initial burden of proving unlawful discrimination, under well-settled rules of order of proof: '[T] he employee must first establish a prima facie [showing] of wrongful discrimination. If she does so, the burden shifts to the employer to show a lawful reason for its action. Then the employee has the burden of proving the proffered justification is mere pretext.' [Citations.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730.) These rules concerning the burden of producing evidence do not affect the

burden of persuasion, which remains on the plaintiff throughout trial. (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 143.)

With respect to disability discrimination, Pace contends that CGM engaged in adverse employment actions by denying her access to clients after her leave of absence and then terminating her; with respect to race and age discrimination, Pace identifies her termination as the relevant adverse employment action. Regarding these contentions, CGM sought to carry its initial burden on summary judgment by showing not only that Pace lacked a prima facie case of discrimination, but also that CGM had legitimate nondiscriminatory reasons for its conduct.[7] Because CGM tendered a rationale for its conduct, we need not address whether Pace established a prima facie case. (*Guz, supra*, 24 Cal.4th at p. 357.) CGM's showing shifted the burden on summary judgment to Pace to raise a triable issue of material fact about the propriety of this rationale. Accordingly, the key question is whether she presented evidence adequate to raise a triable issue of fact that the nondiscriminatory reasons proffered by CGM were pretextual.

a. *Legitimate and Nondiscriminatory Basis for Conduct*

To establish that CGM had a legitimate, nondiscriminatory basis for its conduct regarding Pace's access to clients after her leave of absence, CGM submitted a declaration from Rosen, who stated: "Miller and other [DGE] employees . . . worked with some of the clients Pace had previously serviced until Pace's return to work. When Pace returned from her leave of absence, I ensured that virtually all of the clients to whom she had been assigned prior to her leave were restored to her except for those clients who requested to continue working

[7] The trial court concluded that summary judgment was proper on the latter ground with respect to each discrimination claim.

with Miller. Since there were two [e]vent administrators in [DGE] instead of one, Miller worked with some of the clients Pace had previously worked with. However, Pace was not deprived of any commissions and was paid commissions for each of the events she worked on." In addition, CGM presented evidence that Pace coordinated more events and earned more than Miller in 2003.

To establish that CGM had a legitimate, nondiscriminatory basis for discharging Pace, CGM relied primarily on Ito's and Rosen's declarations. According to the declarations, in 2003 and 2004, Ito noticed that "one time" events such as birthday parties, weddings, and family reunions were increasingly associated with violence and gang-related activity. In 2004, he elected to forego such events in favor of business from "repeat" clients that was more likely to support CGM's core business, namely, gambling. As this change would result in less activity for DGE, Ito also decided to downsize DGE by laying off one of the two event administrators. Rosen recommended that Pace be laid off. Ito made his choice between Pace and Miller on the basis of their overall performance and experience. He considered their work history, disciplinary record, performance reviews, success in generating business, and experience, and decided that Miller was the superior employee.

Based on this showing, the trial court concluded that CGM had shown legitimate nondiscriminatory reasons for its employment actions regarding Pace. We agree. Nothing in Rosen's declaration supports an inference that Pace was unfairly denied access to clients after her leave of absence. Moreover, as our Supreme Court indicated in *Guz*, *supra*, 24 Cal.4th at page 358, an employer's need to reduce its workforce or restructure its business does not invariably constitute a legitimate and nondiscriminatory basis for terminating or demoting workers. However, if an employer's reasons for its conduct are not discriminatory, they "need not necessarily have been wise or correct. [Citation.] While the

objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true would thus preclude a finding *of discrimination*. [Citations.]" (*Id*. at p. 358.)

Here, CGM's evidence indicates that Miller had more experience as an event coordinator than Pace and no disciplinary record; moreover, in 2004, she had handled more events and earned more money than Pace. In addition, approximately one-third of Miller's events resulted from her own efforts to recruit clients, many of which were "repeat clients" who held poker tournaments in CGM's facilities. Because nothing in this showing suggests that Ito's reasons for his decision were discriminatory, they constitute a proper basis for its conduct, regardless of whether they were "wise or correct." (*Guz*, *supra*, 24 Cal.4th at p. 358.)

b. *Pretext*

Because CGM proffered legitimate, nondiscriminatory reasons for its conduct, the burden on summary judgment shifted to Pace to show that CGM's "actual motive was discriminatory." (*Guz*, *supra*, 24 Cal.4th at p. 361, fn. omitted.) The remaining issue, therefore, is whether the record as a whole discloses evidence supporting the rational inference that notwithstanding its proffered reasons, CGM acted with an improper discriminatory motive. To show that CGM's asserted reasons for its conduct were pretextual, Pace contended that (1) Rosen treated Pace unfairly and favored Miller, thereby creating the appearance that Pace's work performance was inferior to Miller's performance; and (2) Ito selected and applied the criteria for the layoff with the improper goal of discharging Pace. In our view, Pace failed to raise a triable issue that the

legitimate reasons offered for CGM's employment decision were, in fact, a pretext for illegal discrimination.

At this point, "to avoid summary judgment," [Pace] had to "'offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.]" An employee in this situation cannot "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee '"must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' [Citations.]" [Citations.]' [Citation.]" (*Horn v. Cushmann & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.)

As our Supreme Court explained in *Guz*, the existence of discriminatory motives cannot be inferred solely from deficiencies in the employer's proffered reasons for its conduct, even when the evidence establishes that these reasons are untrue: "Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.]" (*Guz, supra*, 24 Cal.4th at pp. 360-361.)

i. No Material Triable Issues Regarding Rosen's Motives

We begin with Pace's contentions regarding Rosen, the crux of which is that Rosen acted on prohibited motives regarding Pace's race, age, and disability. Pace's principal contention is that Rosen showed favoritism toward Miller, pointing to evidence (1) that Rosen hired Miller as a permanent employee, although CGM had sometimes hired temporary employees to replace employees on leave; (2) that in hiring Miller, Rosen declined to rehire Shanika Williams, the African-American event administrator GM had laid off as event administrator in early 2002; (3) that Rosen referred more clients to Miller than Pace; and (4) that until June 2003, Miller's base salary was higher than Pace's base salary.

Regarding item (1), Gilmartin testified in an unrelated lawsuit that in 2002 and 2003, CGM sometimes hired temporary employees to fill in for employees in CGM's human resources department who were on pregnancy leave. Regarding item (2), Williams stated in a declaration that when she learned about Pace's medical leave and phoned Rosen about Pace's position, Rosen told her there were no job openings. Regarding item (3), Pace stated in her deposition testimony and in a declaration that after she returned to work, Rosen did not refer clients to her while she was subject to medical restrictions. According to Pace, after her medical restrictions were lifted, Rosen continued to direct more work to Miller, including commissions-based events. Finally, regarding item (4), Rosen testified that in December 2002, Pace complained that her base salary was less than Miller's base salary. Rosen discovered that she had made a mistake in setting Miller's base salary, and arranged for Pace to receive compensating back pay. According to Pace's declaration, she first achieved an equal base salary in May 2003, after she received a merit raise.

We conclude that Pace's showing does not raise triable issues regarding whether Rosen's favoritism constituted proscribed discrimination. It is undisputed that Miller was Rosen's personal friend. As Pace acknowledged in her deposition, she did not know whether Rosen's favoritism rested on the friendship, rather than Miller's race or age. In addressing FEHA claims, California courts often look to federal cases interpreting title VII of the Civil Rights Act of 1964 (title VII) (42 U.S.C. § 2000e et seq.), which resembles FEHA in many respects. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.) Numerous federal courts have concluded that title VII does not proscribe a supervisor's favoritism toward an employee based solely on a friendship or other intimate relationship, even when the favoritism disadvantages someone within a protected class.

In *Brandt v. Shop 'N Save Warehouse Foods, Inc.* (8th Cir. 1997) 108 F.3d 935, a woman asserted that her employer had engaged in gender discrimination in offering an open position to a man without according her an opportunity to apply for the position. The Eighth Circuit held that the employer was entitled to judgment as a matter of law, reasoning that the evidence established only that the supervisor who made the employment decision had hired his friend. (*Id*. at p. 938.) The court stated: "[I]t is not intentional sex discrimination for [a supervisor] to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unemployed nor an old friend and happens to be female. An employer's business decision concerning hiring need not be a good decision to withstand a challenge for sex discrimination; it is enough that it not be motivated by the gender of the employee who is adversely affected by the decision." (*Id*. at p. 938.) Other courts have reached similar conclusions regarding discrimination claims under title VII. (E.g., *Neal v. Roche* (10th Cir. 2003) 349 F.3d 1246, 1251-1252 [race discrimination claim failed in light of evidence that supervisor offered open position to white employee solely to protect her from a layoff that did not

threaten plaintiff's existing position]; *Foster v. Dalton* (1st Cir. 1995) 71 F.3d 52, 54, 56 [race discrimination claim failed in light of evidence supervisor altered job description solely to favor "'fishing buddy'"]; *Holder v. City of Raleigh* (4th Cir. 1989) 867 F.2d 823, 826 [race discrimination claim failed in light of findings that supervisor engaged only in nepotism in hiring son to fill position].)

At least one California court has also concluded that absent special circumstances, favoritism motivated solely by an intimate relationship does not constitute sexual harassment or sexual discrimination under FEHA. In *Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1628 (*Proksel*), an attorney began a romantic relationship with a female clerical worker, gave her a larger bonus than his other employees, and made her his personal secretary after discharging his existing secretary. The discharged secretary initiated an action against the attorney, who obtained summary adjudication on her FEHA claims for sex discrimination and harassment. (*Id*. at pp. 1628-1629.) In affirming the summary adjudication, the appellate court looked to federal cases under title VII and stated: "Where, as here, there is no conduct other than favoritism toward a paramour, the overwhelming weight of authority holds that no claim of sexual harassment or discrimination exists." (*Proksel, supra,* 41 Cal.App.4th at p. 1630.) (Cf. *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 464-466 [citing *Proksel* with approval in holding that sexual favoritism based on intimate relationships within a workplace may constitute sexual harassment when such favoritism is "'widespread,'" rather than "'isolated'"].)

In view of this authority, we conclude that although Pace's showing may raise triable issues regarding whether Rosen favored Miller, it does not establish that the favoritism implicated a proscribed motive. Pace's showing, if fully credited, may support the inference that Rosen lied to former employee Williams, and gave Miller more work -- and for a brief period, a higher base salary -- than

Pace; however, it does not suggest that Rosen's conduct was motivated by anything other than her friendship with Miller.[8]

Pace also contends Rosen betrayed discriminatory animus in connection with the 2002 disciplinary notices and the February 2003 performance evaluation. Pace argues that the May 2002 notice regarding her use of profanity was unfair because Rosen also used profanity, and did not issue a notice when she overheard Alex Augusta, CGM's head of security, swear. Regarding the June 2002 verbal notice, Pace denied any awareness of client complaints, and denied that she received the notice, the written record of which stated that Rosen had heard complaints about Pace from several clients, including one -- described only as the client for the "[l]argest trade show event of the year" -- who no longer wanted to work with Pace. In addition, Pace asserted that in 2003, she had worked with the Sanitary Supply Show -- whom she believed to be the client identified in the notice as unwilling to deal with her -- "without any problem whatsoever." Regarding the notice dated August 16, 2002 -- which criticized Pace for inaccuracies in her banquet event orders -- Pace pointed to her January 2003 response, which challenged the notice. Similarly, Pace supported her challenge to the February 2003 performance evaluation by pointing to her complaints about it.

Pace's showing on these matters does not establish the existence of a discriminatory animus. Employees cannot avoid summary judgment by submitting

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[8] Pace suggests that her complaints to Gilmartin that Rosen's favoritism was due to Pace's age, race, or disability were sufficient, by themselves, to raise triable issues whether Rosen acted on an improper motive. We disagree. (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 996, disapproved on another ground in *Guz, supra*, 24 Cal.4th at p. 351 ["Where a former employee's suspicions of improper motives are primarily based on conjecture and speculation, he or she has not met the requisite burden of proof of establishing a pretextual basis for dismissal. [Citation.]"].)

evidence that merely raises triable issues regarding whether the employer's asserted reasons were "reasonable and well considered"; the employee is obliged to show that the asserted reasons were sufficiently "implausible or inconsistent, or baseless" to support the inference they were a pretext for discrimination. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1009.) That is not the case here.

Pace does not dispute that she used the profanity described in the May 2002 notice, and nothing in Pace's showing suggests Rosen failed to issue notices to other employees within DGE who made inappropriate remarks about supervisors. That Rosen did not issue a notice to Augusta -- who apparently headed a different department within CGM -- does not raise the reasonable inference that she acted in a discriminatory manner with respect to the employees she supervised.

Regarding the June 2002 verbal notice, the fact that the clients in question did not complain directly to Pace does not show that the notice was baseless, as the record contains unrebutted evidence that Rosen sometimes received complaints about Pace.[9] Moreover, Pace presented no evidence that Rosen had not, in fact, received the complaints, with the possible exception of the client described as no longer willing to work with Pace. Generally, "[a] party cannot avoid summary judgment based on mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.) Although Pace's showing may raise a triable dispute regarding the latter client, it fails to do so regarding the remaining clients named in the notice. Accordingly, the notice

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[9] In a letter dated April 6, 2004, Javier Delgado informed Rosen that he no longer wanted to deal with CGM due to Pace's lack of responsiveness to his calls. Although Pace purported to dispute the existence of this letter, it is in the record.

cannot reasonably be regarded as "implausible, or inconsistent, or baseless." (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at p. 1009.)

We reach the same conclusion about the notice dated August 16, 2002. Ito stated that in ordering the notice removed from Pace's work file, he did not determine whether the events described in the notice had occurred: "Rather, I believed that removing the official notice from Pace's file would foster a more positive working relationship between Pace and Rosen and would allow them both to move forward as productive employees." Pace sought to establish that the notice was a pretext for discrimination by pointing to deposition testimony from Ronnie Blackwell, CGM's head of facilities, who stated that he repeatedly complained to Rosen about errors in DGE's banquet event orders even after Pace left.[10] In our view, on this showing, a jury could not reasonably conclude that Rosen's concerns in the notice were baseless, even if it were to determine that she was mistaken about the particular events described in the notice, as Blackwell's testimony establishes that errors in the banquet event orders were a significant problem.

Finally, Pace's challenges to the February 2003 performance evaluation do not show that Rosen acted with a discriminatory motive. Generally, an employee's self-assessment of his or her performance and qualifications is insufficient to raise a triable issue regarding pretext. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 79; *Horn v. Cushmann & Wakefield Western, Inc.*, *supra*, 72 Cal.App.4th at p. 816.) In view of our conclusions regarding the 2002

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[10] As further evidence of Rosen's purported animus, Pace asserted that Rosen testified that Pace's banquet event orders "were always wrong." The cited portions of Rosen's deposition do not support this contention: she testified only that "[m]any times, [Pace's banquet event order] number, the date of the event, was completely wrong."

disciplinary notices, there are no triable issues regarding whether Rosen had a reasonable basis for her concerns regarding Pace's performance.

To show that improper motives influenced Rosen's behavior, Pace points to remarks Rosen made while she supervised Pace. Although Pace conceded that no one at CGM made offensive comments about her disability, she contended that Rosen made such remarks about her race and age. Regarding Pace's race, Pace testified in her deposition that whenever she appeared at work with a hair style known as a "hair wrap," Rosen said it did not "look professional" and told her not to wear it. However, in opposing summary judgment, Pace conceded that Rosen sometimes told other employees, including Miller, that their appearance was not professional and instructed them not to dress or wear their hair in specified ways. In light of this concession, Rosen's remarks about Pace's hair style cannot reasonably be regarded as evidence of racial animus.

Pace also testified in her deposition that between November 2002 and February 2005, Rosen made six to eight age-related comments. These remarks included, "Come on, grandma," and "When you say something about your knees, that's when I really reflect on how old you are," as well as references to "chest pains." Rosen made these remarks as she and Pace left DGM for meetings or to discuss business over lunch.

We conclude that this evidence does not support a rational inference of age discrimination when viewed in the context of the entire record. So-called "stray" remarks by a person charged with an employment decision -- that is, remarks that may suggest bias but are remote, isolated, or otherwise unrelated to the decision -- do not establish discrimination. (*Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 798-799, 801 [supervisor's remark that person seeking supervisory position in truck company "was too old to be a driver" insufficient to show age discrimination]; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703,

705 [supervisor's remark, "'we don't necessarily like grey hair'" and vice-president's remark, "'We don't want unpromotable fifty-year olds around,'" viewed in context, did not raise triable issue regarding age discrimination]; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1423 [decision maker's reference to employee as member of "'an old-boy network'" did not establish age discrimination]; *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1438-1439 [decision maker's reference to successful applicant for position as "'a bright, intelligent, knowledgeable young man'" did not prove age discrimination].) Here, the remarks occurred sporadically over a period of more than two years, and in a context -- when Rosen and Pace went to lunch and meetings -- removed from Pace's principal duties as an event administrator. In our view, they constitute "stray" remarks that do not support a reasonable inference of discrimination.

i. *No Material Triable Issues About Ito's Decision*

Pace's second principal contention is that Ito's asserted reasons for laying her off were pretextual. As we have explained (see pt. 4.a., *ante*), on CGM's showing, Ito made his choice between Pace and Miller after receiving Rosen's recommendation that Pace should be laid off. According to Ito, he decided that Miller was the better employee after considering both employees' work history, disciplinary record, performance reviews, success in generating business, and experience. It is undisputed that in 2004, Miller handled more events than Pace and solicited more events than Pace through her own efforts; moreover, in view of our conclusions above, there are no material factual disputes regarding the superiority of Miller's disciplinary record and performance reviews.

Pace contends there are triable issues regarding whether Miller had more work experience as an event coordinator. This contention fails in light of Pace's own deposition testimony. Miller testified that prior to her employment at CGM,

she had acted as a paid event coordinator in several businesses for approximately four years, and had several years' additional experience in related positions. In contrast, Pace testified in her deposition that she had no paid experience as an event coordinator prior to her employment at CGM: she had arranged one or two retirement parties and five to ten luncheons for one employer -- although this was not among her job responsibilities -- and had coordinated ten to twenty events on an unpaid basis for the NCNW, of which she was a member.[11]

Pace also contends Ito intentionally omitted a criterion -- namely, seniority -- likely to favor her. To establish that CGM's standard criteria for layoffs included seniority, Pace submitted declarations from Edith Lemus and Bill Vanderberg. Lemus stated that she worked in CGM's human resources department from September 1996 to February 2002, when she was laid off. According to Lemus, seniority figured as a criterion for CGM's layoffs during her tenure. Vanderberg stated that he began working in CGM's human resources department in July 1994, became its manager in February 1996, and was laid off in January 1999. According to Vanderberg, CGM's standard criteria for layoffs were performance and seniority. Pace also pointed Gilmartin's 2003 deposition in Lemus's action against CGM. There, Gilmartin testified that "[i]n some cases," seniority was a factor in layoffs.

In our view, this evidence does not raise a triable issue regarding Ito's layoff criteria. An employer's departure from its *existing* layoff procedures, by itself, is

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[11] In an effort to raise a triable issue on the question of experience, Pace pointed to her declaration, which asserted that she had been a member of the NCNW for ten years, and "had the same duties that [she had] at CGM in coordinating events for [NCNW]." Generally, a party opposing summary judgment cannot create a triable issue by submitting a potentially self-serving declaration from a witness that is at odds with the witness's deposition testimony or discovery responses. (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.) To the extent Pace's declaration contradicts her deposition testimony, it must be disregarded.

insufficient to show pretext, absent evidence raising the reasonable inference that the departure was discriminatory. (See *Randle v. City of Aurora* (10th Cir. 1995) 69 F.3d 441, 445; *Rose v. Wells Fargo & Co., supra,* 902 F.2d at p. 1422.) Because Pace's showing addressed CGM's layoff criteria and policies in 2002 and earlier, well before CGM laid Pace off in 2005, it does not show that Ito's selection of his layoff criteria in 2005 was pretextual.

In an effort to show that Ito acted with improper motives, Pace contends that CGM used layoffs to mask discriminatory employment decisions. She points to Vanderberg's declaration, which stated that Paul Jackson, who managed the human resources department when Vanderberg was hired in the 1990's, told him that CGM had a policy of terminating "problematic" employees through layoffs. After Vanderberg was laid off, he filed an action for discrimination and retaliation against CGM which ended in his favor. Pace also argues that discrepancies in the testimony of CGM employees regarding Rosen's criteria for selecting Pace for a layoff corroborate the existence of this policy, as does the pattern of CGM's employment decisions regarding DGE.

We conclude that this evidence does not raise a reasonable inference of discrimination. Jackson's remarks to Vanderberg and CGM's employment decisions regarding Vanderberg are too remote from Pace's layoff to support such an inference, as they predate the layoff by six or more years.[12] (*Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th at pp. 1730-1735 [laid off employee failed to raise triable issues regarding age discrimination by submitting evidence that employer followed discriminatory policy three years before her layoff].) Nor

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[12] Pace also suggests that CGM's failure to offer her an open position in CGM's security department upon her layoff raises an inference of discrimination. As she presented no evidence that she was qualified to fill the open position, the inference she proposes is speculation.

do the variations within the testimony regarding Rosen's criteria for selecting Pace establish discrimination, as there appears to be no triable issue that Miller was the superior employee as judged by *each* set of criteria attributed to Rosen.[13] (*Guz*, *supra*, 24 Cal.4th at pp. 364-365 [employer's varying explanations for employee's layoff do not raise triable issues regarding motive when record establishes that employer had good business reasons for its decision].)

Pace's evidence regarding CGM's pattern of employment decisions regarding DGE also does not establish discrimination. According to Pace's showing, DGE -- a small department with only seven employees when Pace was hired -- lost employees through layoffs and ultimately merged with another unit.[14]

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[13] Rosen testified that in recommending Pace for a layoff, she looked at criteria specified by Ito and CGM's human resources department, including work performance, the ability to deal with clients, computer skills, and (perhaps) other factors she could not recall. According to Gilmartin, Rosen told her that she had selected Pace on the basis of "sales performance." Stephanie Dinwiddie, who worked in the human resources department, stated that the applicable criteria were work performance, prior experience, disciplinary issues, attendance, and ability to work in a team.

[14] The record discloses that when CGM hired Pace in May 2000, DGE's director was Janice Carbonniere, a Caucasian. Aside from Pace and Carbonniere, DGE employed Nevenko Budesa, a 63-year-old Caucasian, Gwen Pollard, an "African American/Caucasian" in her late '20s, and three other employees. Shortly after Pace was hired, DGE lost two of the latter three employees -- a 53-year-old Caucasian man was laid off and a 35-year-old Hispanic woman resigned -- and DGE acquired Shanika Williams, a 22- or 23-year-old African-American, as an event administrator. In early 2002, after Rosen replaced Carbonniere as DGE's director, Ito directed Rosen to lay off Budesa and to select Williams or Pace for a layoff in accordance with the following criteria: performance, ability to handle events, and ability to work in a team. Rosen choose Williams. Miller was hired in October 2002.

In 2004, Ito told Rosen about another layoff, and Rosen selected Pollard to be laid off. Pollard left CGM in July 2004. According to Rosen, she could not recall the criteria provided to her regarding Pollard's layoff. After CGM laid Pace off in February 2005, it merged DGE with its marketing department and laid Rosen off, but retained Miller.

Pace argues that the pattern of layoffs -- including the layoffs of two other African-Americans -- supports an inference of racial discrimination.

In *Guz*, our Supreme Court rejected such an argument on similar facts. (*Guz*, *supra,* 24 Cal.4th at pp. 366-369.) There, the employer disbanded a unit with six employees, found other positions for the two youngest employees, and laid off the others, including the plaintiff, without offering the plaintiff one of several open positions. (*Id*. at p. 330.) The court concluded that any purported inference of age discrimination based on the layoffs was undermined by the small size of the unit and other facts: the pattern of layoffs was capable of supporting contradictory inferences regarding the employer's motives, and the open positions were filled by employees with qualifications that equaled or exceeded the plaintiff's qualifications. (*Id*. at pp. 367-368.) In this context, the *Guz* court cited with approval several cases in which the sample was deemed too small to support a reliable inference of discrimination. (E.g., *Fallis v. Kerr-McGee Corp.* (10th Cir. 1991) 944 F.2d 743, 745-746 [sample of 51 employees]; *Sengupta v. Morrison-Knudsen Co., Inc.* (9th Cir. 1986) 804 F.2d 1072, 1076 [sample of 28 employees]; *Simpson v. Midland-Ross Corp.* (6th Cir. 1987) 823 F.2d 937, 942-944 [sample of 17 persons].)

We reach the same conclusion here. Any purported inference of race discrimination is weakened by the small size of the sample, and is otherwise fatally diluted by other facts. The pattern in question -- which encompasses hirings, firings, and layoffs over a three-year period ending in DGE's dissolution -- supports the inference that CGM did not engage in race discrimination, as it discloses that on at least one occasion CGM hired an African-American when it terminated a Caucasian employee. Moreover, as we have explained, there is no triable issue that Miller -- the only employee CGM retained after eliminating DGE

-- was superior to Pace. In sum, the record, taken as a whole, does not disclose triable issues regarding discrimination.

5. *Retaliation*

Under FEHA, retaliation claims, like discrimination claims, are subject to the federal "three stage burden-shifting test." (*Guz, supra*, 24 Cal.4th at p. 354.) "The elements of title VII and [FEHA] claims require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [conduct]. [Citations.] [¶] . . . To establish a prima facie case, the [employee] must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action. [Citations.]" (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

Here, as with Pace's discrimination claim, CGM denied that Pace could present a prima facie case of retaliation, and also offered a showing of legitimate nonretaliatory reasons for its conduct.[15] On appeal, Pace contends that CGM laid her off in retaliation for her repeated complaints about Rosen's discrimination and favoritism. We limit our inquiry to this contention.[16]

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[15] The trial court concluded, inter alia, that Pace presented no evidence of a causal link between her protected activity (if any) and her layoff and no evidence of pretext.

[16] Pace's complaint alleges CGM retaliated against her for requesting a medical leave and reasonable accommodations in 2002. We do not examine whether these allegations support a tenable retaliation claim as Pace has presented no argument on appeal in support of this contention.

In seeking summary judgment, CGM proffered evidence that it had a legitimate non-retaliatory basis for laying Pace off, namely, the need to downsize DGE.[17] To raise an inference that CGM's asserted reasons were a pretext for retaliation, Pace points to the following evidence: Pace complained to Gilmartin about Rosen's discrimination and favoritism in March or April 2003, October or November 2004, December 2004, and January 2005. After Pace initiated her action against CGM, CGM responded to her special interrogatories, stating that in January 2005, Pace complained about Rosen's favoritism to Gilmartin, who investigated the complaint and found that it was meritless. The interrogatories were verified by Stephanie Dinwiddie, a manager in the human resources department. Nonetheless, when Pace deposed Gilmartin and Dinwiddie, Gilmartin denied that she investigated Pace's complaints, and Dinwiddie acknowledged that she did not know whether the January 2005 complaint had been investigated. In addition, Pace directs our attention to her evidence regarding CGM's purported policy of using layoffs to eliminate "problematic" employees through layoffs.

The trial court concluded this showing was insufficient to preclude summary judgment in CGM's favor. We agree. Although Pace's evidence may raise triable issues regarding whether Gilmartin investigated Pace's complaints, nothing before us suggests that Gilmartin contributed to Ito's decision to lay Pace off. The record establishes that in early 2003, Pace complained about the disciplinary notice dated August 16, 2002 and the February 2003 performance evaluation. These complaints included Pace's allegations that Rosen favored Miller. As a result of the complaints, Ito met with Gilmartin, Rosen, and Pace, directed that the disciplinary notice be removed from Pace's work file, and agreed that Rosen should reevaluate Pace. Thereafter, Rosen gave Pace a favorable evaluation, and Pace received no

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[17] In view of this showing by CGM we do not address whether Pace established a prima facie case of retaliation. (See *Guz*, *supra*, 24 Cal.4th at p. 357.)

further disciplinary notices or substandard evaluations. Although Pace reiterated her complaints about favoritism in late 2004 and early 2005 to Gilmartin, it is undisputed that Ito was unaware of these complaints. Moreover, Pace points to no evidence that Rosen knew about the complaints when she recommended to Ito that Pace be laid off.

In our view, nothing in the record reasonably suggests that Ito made his decision on any basis other that the grounds CGM asserted for the layoff. There is no evidence that Pace's complaints in late 2004 and early 2005 affected Ito's decision. Although Ito and Rosen knew about Pace's complaints in early 2003, their conduct following the complaints belies the inference that the complaints influenced Ito's decision nearly two years later. Moreover, as explained above (see pt. B.4.b, *ante*), Pace failed to raise a triable issue regarding whether CGM's grounds for laying her off were pretextual. Summary adjudication on Pace's retaliation claim was therefore proper.

C. *Tameny and Unfair Business Practices Claims*

Pace contends that the trial court erred in granting summary adjudication on her claim for wrongful termination in violation of public policy (eighth cause of action) -- often called a "*Tameny* claim" -- and claim for unfair business practices (eleventh cause of action).[18] *Tameny* claims supplement FEHA claims alleging an improper termination due to race, age, disability, or retaliation, and may be asserted in conjunction with such claims. (*Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 225-238 [race, age, and retaliation]; *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507, 1515

[18] In *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 169-170, our Supreme Court held that employees may bring an action in tort when their discharge contravenes the dictates of fundamental public policy.

[disability].) Similarly, a plaintiff alleging FEHA violations may in some circumstances also assert a claim that the violations constitute unfair business practices (Bus. & Prof. Code, § 17200 et seq.). (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 401 [age discrimination]; *Herr v. Nestle U.S.A., Inc.* (2003) 109 Cal.App.4th 779, 789 [same].) As Pace's *Tameny* and unfair business practices claims rest on the same facts as her FEHA claims, they fail for the same reasons. (See *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1261; *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 612-613.)

D. *Labor Code Claims*

Pace contends that the trial court erred in granting summary adjudication regarding her claims under the Labor Code. Pace's complaint asserts that CGM improperly denied her meal and rest breaks while she was employed (tenth cause of action); in addition, the complaint asserts that CGM improperly classified her as an "exempt" employee, and thus denied her pay for overtime work (twelfth cause of action).[19] As explained below, these claims fail for want of a triable issue of fact.

1. Governing Laws and Regulations

Labor Code section 511 accords employees who work beyond specified time limits an entitlement to overtime pay, and Labor Code section 512 obliges employers to provide meal breaks. Under Labor Code sections 515 and 516, the

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[19] Pace's complaint also contains a claim (ninth cause of action) that CGM unlawfully denied her payment for accrued vacation time upon her termination (Lab. Code, § 227.3). As her brief on appeal contains no argument that summary adjudication was improper on this claim, she has forfeited any such contention. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.)

IWC is authorized to exempt executive, administrative, and professional employees from overtime pay requirements, and to adopt orders regarding meal and rest breaks, "[e]xcept as provided in [Labor Code s]ection 512."

The IWC order applicable here is Wage Order No. 5-2001, which applies to "persons employed in the public housekeeping industry," and directs employers to pay overtime compensation and "authorize and permit" at least one 10-minute break per 4-hour work period. (Cal. Code Regs., tit. 8, § 11050, subds. 1, 3(A), 12(A).) It exempts "persons employed in administrative, executive, or professional capacities" from these requirements. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B).)

Under the order, an exempt administrative employee (1) has duties involving "[t]he performance of office or non-manual work directly related to management policies or general business operations of" the employer or its customers; (2) "customarily and regularly exercises discretion and independent judgment"; (3) "regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity"; (4) "performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge[,]" or "executes under only general supervision special assignments and tasks"; (5) "is primarily engaged in duties that meet the test of the exemption"; and (6) "earn[s] a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment." (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(2).)

Pace does not dispute that she earned approximately $40,000 per year while working at CGM, and thus satisfied item (6). She argues only that there are triable issues regarding the remaining factors.

2. Parties' Showings

In seeking summary judgment, CGM submitted evidence that Pace's duties and responsibilities rendered her an administrative employee. According to CGM's showing, as an event administrator, Pace was ordinarily the first person to assess the suitability of a potential event, and, as such, had the authority to decide whether CGM would handle the event. Once Pace decided to accept the business, she planned and negotiated each aspect of the event, including the date, time, length, and room; number of attendees; menu, setup fees, decorations, food, and entertainment; in addition, she prepared a letter of intent that memorialized these matters. She was authorized to negotiate financial matters, including the payment of a deposit, reservation terms, the cancellation policy, and modifications to the original contract. She handled the billing and credit arrangements, and was responsible for collecting the client's payment. She also met with CGM's chefs to arrange for special dishes or menu items; conducted preparatory "walk throughs" with the client; and handled the client's complaints. She apprised Rosen about the event until its completion, but ordinarily was on hand when the event occurred. Aside from these duties, Pace also attended trade fairs to promote CGM.

Although Pace conceded that she was responsible for preparing letters of intent, selecting a menu and table decorations, conducting "walk throughs," handling complaints, and communicating with Rosen, she maintained that she had little authority over the events for which she was responsible. In support of this contention, she relied on her own declaration, which asserted: "[My] duties were . . . making and returning telephone calls to clients wanting to hold events at CGM . . . . I had to follow pre-set policies and procedures . . . . I did not have the authority to negotiate the prices. The types of clients that had events were predetermined by CGM. I had no independent discretion or judgment. I could not hire or fire an employee. I had no authority to discipline anyone."

In addition, Pace pointed to excerpts from Rosen's deposition and DGE's policy and procedure manual for events. According to the excerpts, Rosen stated that Pace's responsibilities began with the clients' phone call; that CGM had a "set list of [] policies and procedures . . . with regard to catering and/or room rental"; that CGM did not accept gang-related events; that once the client called, Pace could decide whether to accept the event, and recommend a room and date; that CGM had a standard menu for which the prices were fixed, but Pace could work out special menus; that Pace had to request Rosen's permission to accept less than the pre-set deposit; and that CGM used a form letter of intent.[20]

3. Analysis

The trial court concluded there was no triable issue regarding whether Pace was an exempt administrative employee. We agree. On CGM's showing, Pace's principal duties accorded her significant discretion and judgment over events. She had authority to turn away some clients, and once she accepted a client, she had primary responsibility for the event. Her role in planning and supervising the event was managerial in tenor: she negotiated with the client about the services CGM would provide for the event, and ensured that the services were provided as agreed on the date of the event. In conducting these activities, she ordinarily acted only under Rosen's general supervision.

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[20] Pace's excerpt of Rosen's testimony regarding Pace's discretion with respect to menu prices omits Rosen's full answer. In response to the question, "And the prices were already set for the menu, correct?", Rosen answered: "Yes. We also had clients that did go off the menus if they wanted a custom menu done, which the sales associates would work out themselves." Pace's showing omits the portion of Rosen's answer following the word "off." In our view, Rosen's testimony is properly understood in the context of her full answer. (See *Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 271, fn. 8 [party opposing summary judgment fails to create triable issue by citing deposition testimony out of context].)

In our view, Pace failed to raise a material triable issue regarding her status as an exempt employee. In large measure, Pace's declaration conflicts with her prior deposition testimony, in which she stated that she sometimes turned down a client during the initial phone call because the event might be gang-related, or for other reasons; that she made suggestions to the client regarding alternative dates, rooms, and menu items; that she sometimes talked to CGM's chefs about special dishes or menu items; that she made decisions about extending the time for payment of deposits, "but . . . with [Rosen's] knowledge"; that she was generally responsible for "walk-throughs"; and that she promoted CGM's business by soliciting clients through phone calls and attending trade fairs. To the extent Pace's declaration contradicts her testimony, it must be disregarded. (*Preach v. Monter Rainbow*, *supra*, 12 Cal.App.4th at p. 1451.)

To the extent Pace's showing is cognizable, Pace established that she operated within the general framework of the DGE's policies and procedures for events. However, with the possible exception of Pace's control over the amount of deposits, there is no material dispute that she exercised considerable "discretion and independent judgment" within this framework (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(2)).

Pointing to *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 (*Bell*), Pace contends that she was a "productive" rather than an "administrative" worker, and as such, was not an exempt employee. In *Bell*, a class of insurance claims representatives asserted a claim for overtime compensation against their employer, an insurer, alleging they were improperly classified as exempt administrative employees. (*Id*. at pp. 808-809.) The plaintiffs obtained summary adjudication on the employer's defense that they were exempt employees. (*Ibid*.) To interpret the exemption for administrative employees in the governing wage order, the appellate court looked to federal case authority -- including *Martin v. Cooper Elec. Supply*

Co. (3d Cir. 1991) 940 F.2d 896 (*Martin*) -- which has construed the analogous federal exemption in light of a dichotomy between productive and administrative workers. (*Bell, supra,* 87 Cal.App.4th at pp. 812-823.)

In *Martin*, the Third Circuit addressed whether certain "in-house" salespersons working for a company were exempt employees. (*Martin, supra*, 940 F.2d at pp. 898-899.) The company was a wholesaler of electrical goods whose customers included contractors, institutions, and governmental agencies. (*Id*. at p. 902.) The salespersons made sales through phone calls; although the goods had fixed prices within the company's inventory, the salepersons had some discretion to adjust the prices. (*Ibid.*) The Third Circuit concluded that because the company's primary business was the sale of electrical goods and the salespersons engaged in "routine wholesale sales," the salespersons were properly classified as "production" employees, rather than as exempt administrative employees. (*Id*. at pp. 903-905.)

In *Bell*, the appellate court determined that the plaintiffs handled claims arising under the employer's insurance policies -- one important component of the employer's business -- and that the plaintiffs were engaged in "the routine of processing a large number of small claims," although they exercised some discretion in some of their tasks. (*Bell, supra,* 87 Cal.App.4th at pp. 826-829.) The court thus held that the plaintiffs fell squarely on the "production side" of the production-administrative worker dichotomy. (*Id*. at p. 826.)

In so concluding, the court in *Bell* acknowledged that employees sometimes perform "specialized functions . . . that cannot be readily categorized," noting *Haywood v. North American Van Lines, Inc.* (7th Cir. 1997) 121 F.3d 1066 (*Haywood*). (*Bell, supra,* 87 Cal.App.4th at pp. 826-829.) There, a customer service representative sought overtime compensation as a nonexempt employee from her employer, a shipping company engaged in moving personal goods.

(*Haywood*, *supra*, 121 F.3d at p. 1067.) In obtaining summary judgment on the claim, the employer established that as a customer service representative, the plaintiff was responsible for ensuring "quality service" and resolving customer complaints, and that she was the "sole contact person" between the employer and the customer regarding these complaints. (*Id*. at pp. 1067-1068.) The Seventh Circuit affirmed the grant of summary judgment, reasoning that the plaintiff was not a production worker because she operated at one remove from the employer's principal service -- the moving of goods -- and that her employer granted her considerable discretion and authority to resolve customer complaints. (*Id*. at pp. 1071-1074.)

Other federal courts have also held that employees with substantial discretion to arrange, monitor, or modify the employer's delivery of services are properly viewed as administrative, rather than production, employees. (See, e.g., *Reich v. John Alden Life Ins. Co.* (D.Mass. 1996) 940 F.Supp. 418, 419-423, affirmed in *Parker v. Wakelin* (1st Cir. 1997) 123 F.3d 1 [market representatives for an insurance company who dealt with large numbers of independent insurance agents, recommended insurance products to them, and helped them bid on new business were exempt, even though they had no authority to alter the prices or terms of insurance policies, and no direct contact with the ultimate purchasers of the policies]; *Reich v. Haemonetics Corp.* (D.Mass 1995) 907 F.Supp. 512, 513-518, [business analysts for company that made and sold medical equipment were exempt because their primary duty was to analyze sales transactions proposed by the company's sale representatives for profitability, and to modify the transactions, subject to manager approval].)

We conclude that Pace falls on the "administrative worker" side of the dichotomy. It is undisputed that in 2005, CGM had 1039 employees, and that its "core business" was gambling. To further CGM's central business activity, it

offered facilities and related entertainment services for gambling-related events. Until 2005, CGM also offered its facilities and services for events unrelated to gambling, such as birthday parties, family reunions, and weddings. Like the plaintiff in *Haywood*, Pace did not "produce" CGM's underlying facilities and services; she worked at one remove from them, acting as the client's main point of contact with CGM throughout the planning and occurrence of the client's event. She had primary responsibility for the event, including ensuring client satisfaction and resolving complaints.

Because CGM properly classified Pace as an exempt employee, her claim for overtime compensation fails as a matter of law, as does her claim regarding meal and rest breaks, insofar as it relies on Wage Order No. 5-2001. To the extent Pace's claim regarding meal breaks may find an independent basis in Labor Code section 512, it also fails on the undisputed facts. Labor Code section 512 obliges employers to "provide[]" meal breaks at specified intervals. In seeking summary judgment, CGM pointed to Pace's deposition testimony that no one told her that she could not take breaks. To raise a factual dispute, Pace's declaration stated that she "was forced to forego . . . meal and rest periods"; in addition, she provided a declaration from Shanika Williams, who stated that she saw Pace work through breaks. As explained above, Pace's declaration must be disregarded, as it conflicts with Pace's admission that CGM did not bar her from taking breaks. That Pace elected not to take the breaks does not support a tenable claim under Labor Code section 512. (*Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 532-534; *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1087-1090.) In sum, summary judgment on Pace's claims was proper.[21]

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[21] In view of this conclusion, we do not address Pace's contention regarding her entitlement to an award of punitive damages.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.